No. 79-383

FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1979

F. W. STANDEFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The court of appeals panel wrote no opinion. The opinion of the court en banc (Pet. App. 1a-72a) is not yet reported. The opinion of the district court (Pet. App. 75a-112a) is reported at 452 F. Supp. 1178.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 10, 1979. The petition for a writ of certiorari was filed on September 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant accused of aiding, abetting, counseling, commanding, inducing, or procuring the commission of an offense against the United States may be convicted under 18 U.S.C. 2 after the actual perpetrator has been acquitted.

2. Whether the district court erred in instructing the jury that a violation of 18 U.S.C. 2 does not require proof of an agreement and that it could not consider whether income tax returns and reports received by an IRS official were correct in determining whether a violation of 26 U.S.C. 7214(a)(2) had occurred.

STATUTES INVOLVED

18 U.S.C. 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. 201(f) provides as follows:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official [is guilty of an offense].

26 U.S.C. 7214(a)(2) imposes a criminal sanction against:

> Any officer or employee of the United States acting in connection with any revenue law of the United States * * * who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on four counts of making gifts to a public official, in violation of 18 U.S.C. 201(f), and on five counts of aiding and abetting a revenue official in accepting compensation in addition to that authorized by law, in violation of 26 U.S.C. 7214(a)(2).[1] Petitioner was sentenced to concurrent terms of six months' imprisonment followed by two years' probation on each count. He was fined $2,000 on each count, for a total of $18,000.

1. The evidence at trial established that petitioner had been the head of Gulf Oil Company's tax department in Pittsburgh, Pennsylvania, since 1966 (Tr. 981). At the time of trial he was Vice President in charge of tax administration (Tr. 982). Co-

[1] Petitioner was indicted together with Gulf Oil Corporation and Joseph Fitzgerald, a manager in Gulf's tax department. Gulf pleaded guilty and Fitzgerald pleaded nolo contendere to all counts of the indictment.

defendant Joseph Fitzgerald was a manager in the tax department (Tr. 116, 795). Cyril Niederberger was an agent of the Internal Revenue Service in Pittsburgh who was the large-case manager in charge of the audits of Gulf Oil Company's income tax returns from 1967 until June 1974 (Tr. 1128-1129, 1134). In this position, Niederberger supervised a group of revenue agents assigned to audit certain of Gulf's corporate tax returns (Tr. 376-379). His responsibilities included the development of audit plans, which consisted of detailed outlines of specific procedures to be utilized during each particular audit. In developing these plans, Niederberger made all final decisions with respect to the scope and depth of the investigation to be undertaken by the IRS agents (Tr. 376-377). In addition, as large-case manager Niederberger submitted a large-case report at the conclusion of each audit. This report was the major source of information about the audit and was used by the IRS in making its decisions to challenge any aspect of the returns. Due to the complexity of large audits, it was virtually impossible for any reviewing process to discover omissions in the large-case report (Tr. 503). For these reasons the large-case manager was the single most important IRS official in a corporate audit (Tr. 495).

During the period of time Niederberger served as the large-case manager for the Gulf audits, he received five free vacations paid by Gulf:

a. *Pompano Beach (July 1971):* The first of these vacations took place in July 1971. Niederberger requested that Fitzgerald make him hotel reservations in Pompano Beach, Florida (Tr. 813-814). Fitzgerald made these reservations and sent the hotel a $50 advance deposit, for which he was reimbursed by Gulf (Tr. 13, 812). The Niederbergers stayed in Pompano Beach from July 11 through July 18 (Tr. 13-14). Acting on instructions from petitioner, Fitzgerald paid for the Niederbergers' hotel and restaurant bill, a total of $356.80, and was reimbursed for this amount by Gulf (Tr. 18-26, 812, 849-950, 1016).

b. *Miami (January 1973):* On January 19-22, 1973, Niederberger accompanied petitioner, Fitzgerald, and a Gulf consultant to Miami, Florida, for a golfing vacation at the Doral Country Club (Tr. 73-76). Niederberger had been invited by Fitzgerald, who was acting on instructions from petitioner (Tr. 815, 1019). Niederberger's expenses, including air fare, hotel accommodations, meals, and golf fees were paid for by Gulf (Tr. 77, 131-132, 1020).

c. *Absecon (August-September 1973):* On August 31 through September 3, 1973, the Niederbergers were again invited on a golfing vacation with petitioner, Fitzgerald, and several other Gulf personnel. The group stayed at the Seaview Country Club in Absecon, New Jersey (Tr. 31-44). Again, Gulf paid for the Niederberger's air fare, meals, golf, and lodging (Tr. 312-314, 843).

d. *Pebble Beach (April 1974):* Again acting at petitioner's request, Fitzgerald made arrangements for a vacation for Niederberger at Pebble Beach,

California (Tr. 818-819). Niederberger, Fitzgerald, and petitioner stayed at the golf resort from April 2-4, 1974. Gulf paid all expenses (Tr. 90-96, 316-317, 1035).

e. *Las Vegas (June 1974)*: The Niederbergers were given a final free vacation in June 1974. Petitioner, Fitzgerald, Niederberger (and family members) and another Gulf employee travelled to Las Vegas, Nevada, and stayed at the Desert Inn and Country Club from June 17-June 21, 1974 (Tr. 104-110). At petitioner's instruction, the Niederbergers were given $200 cash for expense money, and their entire bill was paid for by Gulf (Tr. 317, 828-830). Other members of the Gulf party were given only $50 cash for expenses (Tr. 830).

In addition to the five vacations provided to Niederberger by Gulf, Niederberger received free meals, drinks, entertainment or gifts from Gulf on 302 other occasions (Tr. 253). The total value received by Niederberger was approximately $7,000 dollars (Tr. 201). While documentation for these other expenditures was attached to the expense reports and filed in the general accounting file, documentation for the vacation trips was preserved by the tax department in their confidential files (Tr. 267-269, 845, 868). No IRS agents other than Niederberger received free vacation trips, and Niederberger was not given vacations after June 1974, when he ceased to be the large-case manager for Gulf (Tr. 201-202, 844, 845, 1075-1076).

Harold Levin, the Chief of the Appellate Branch of the IRS in Richmond, Virginia, testified that the

dates of the vacations given to Niederberger often coincided with important dates in the administration of the Gulf audits (Tr. 375-383). The audit plan for the years 1962-1964 was approved on July 14, 1971 (Tr. 381); the Pompano Beach vacation concluded and was paid for by Gulf on July 18, 1971 (Tr. 14). The audits for the years 1965-1966 were closed between February 23 and March 5, 1973 (Tr. 382); the Miami vacation had taken place one month previously, on January 19-22, 1973 (Tr. 73). The 1967-1968 audits were closed between May 10 and June 22, 1973, and the plan for Gulf's 1969-1970 audit was approved on June 27, 1973 (Tr. 383); the Absecon vacation occurred two months later, from August 31 to September 3, 1973 (Tr. 57). The 1969-1970 audits were closed between April 15 and June 27, 1974 (Tr. 383); the Pebble Beach vacation was April 2-5, 1974, and the Las Vegas trip was June 17-21, 1974 (Tr. 90-95, 106-110). Significantly, these four audits were all closed as "agreed audits," that is, Gulf agreed to pay proposed additional assessments without resort to available administrative procedures (Tr. 377-386). Levin testified that it was unusual for four large audits all to be closed in this way (Tr. 386).

In addition, the reservations for the Pebble Beach trip were made on March 28, 1974—the same date Niederberger submitted a memorandum concluding an IRS investigation of a slush fund maintained by Gulf for the purpose of making political contributions (Tr. 94, 386-387). Niederberger had been assigned by the IRS to investigate the slush fund, which was

maintained by the Bahamas Exploration Corporation, a subsidiary of Gulf (Tr. 390-391, 572). At that time the Bahamas Exploration Corporation showed a deficit of $9.2 million due in part to $5 million in secret campaign contributions given to local, state and national politicians (Tr. 398, 550-552). At the time Niederberger conducted his investigation, federal authorities, in particular the Watergate special prosecutor,[2] knew only of the existence of approximately $350,000 of the fund (Tr. 540). Although Niederberger was informed by the attorney for Gulf that approximately $5 million had come out of the slush fund over the years, he refrained from revealing this figure in his report to the IRS (Tr. 394-403, 552, 564). Instead, Niederberger submitted a report, prepared almost completely by Gulf's attorney, which indicated that the deficit was largely due to expenses in oil exploration (Tr. 399). Based on Niederberger's memorandum, the 1968-1970 audits were closed (Tr. 403). Had Niederberger's superiors at the IRS known of the $5 million in contributions, the audits would have been expanded rather than closed (Tr. 406).

Petitioner took the stand at trial and testified in his own defense. He admitted that he and Fitzgerald had provided the trips in question and that they had been paid for by Gulf funds (Tr. 985). Petitioner

[2] On November 13, 1973, Gulf pleaded guilty to making political contributions in violation of 18 U.S.C. 610 (Tr. 400, 417).

contended that the trips had been purely social in nature, although he conceded that they were designed to "relieve tension" that might otherwise develop on a large audit and to "establish rapport" with the IRS (Tr. 985, 1035). Although petitioner insisted that Niederberger was taken along on the golf vacations as a friend, petitioner admitted that he had never called Niederberger at home or at his office, never visited Niederberger's home, and had never used his own money to pay for gifts to Niederberger (Tr. 1073, 1077). Fitzgerald testified that petitioner and Niederberger were not close personal friends (Tr. 826). Petitioner also regularly submitted "representation letters" to his superiors stating that all expenditures made or authorized by him, including payments for the vacation trips, were in the ordinary course of Gulf's business and that Gulf would benefit directly or indirectly from the expenditures (Tr. 124-130, 157-158).

2. Petitioner was charged with four counts of violating 18 U.S.C. 201(f), with respect to the Miami, New Jersey, Pebble Beach, and Las Vegas vacations. That statute prohibits making direct or indirect gifts or promises "because of any official act performed or to be performed" by a public official (see page 2, *supra*). He was also charged with five counts of violating 26 U.S.C. 7214(a)(2) and 18 U.S.C. 2, one count with respect to each of the vacations.[3] 26 U.S.C. 7214(a)(2) prohibits any federal employee, acting in connection with any revenue law, from re-

ceiving any "fee, compensation, or reward * * * for the performance of any duty" (see page 3, *supra*). 18 U.S.C. 2(a) provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal." In the five counts charging violations of Section 7214(a)(2), petitioner was charged with aiding, abetting, counseling, commanding, inducing or procuring Niederberger's acceptance of compensation not authorized by law.

Niederberger had been tried separately on similar charges in a previous trial. Niederberger was charged in a ten-count indictment with violating 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2) with respect to each of the five vacation trips. He was convicted on four counts of violating Section 201(g) (as to the Miami, Absecon, Pebble Beach, and Las Vegas vacations) and on two counts of violating Section 7214(a)(2) (as to the Pebble Beach and Las Vegas trips). He was acquitted on both counts involving the Pompano Beach trip and the Section 7214(a)(2) counts with respect to the Miami and New Jersey trips.[4]

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[3] The statute of limitations had apparently run on any violation of 18 U.S.C. 201(f) in connection with the Pompano Beach vacation.

[4] Niederberger's convictions were affirmed by the court of appeals. *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978).

Prior to petitioner's trial, he filed a motion to dismiss the counts charging him with violations of Section 7214(a)(2) in connection with the Pompano Beach, Miami, and Absecon vacations. He argued that because Niederberger, the only named principal, had already been acquitted of the underlying violations of Section 7214(a)(2) in connection with those vacations, petitioner, as a matter of law, could not be convicted as an aider and abettor (A. 24a-35a). The district court denied petitioner's motion to dismiss; petitioner proceeded to trial and was convicted on all nine counts.

3. The court of appeals en banc affirmed petitioner's convictions (Pet. App. 1a-72a). The court held that an aider and abettor may be convicted notwithstanding the acquittal of the principal he is charged with aiding and abetting so long as the evidence in the trial of the aider and abettor supports the finding that the principal committed the crime. The court first reviewed (*id.* at 8a-26a) the legislative history of the aider and abettor statute, 18 U.S.C. 2, and concluded that Congress intended that aiders and abettors be tried "as principals" and intended to abrogate any common-law requirement that "an accessory to a crime could not be convicted unless and until the principal whom he had assisted had been convicted of committing the substantive offense" (Pet. App. 10a). The court refused to revive that part of the common-law rule that barred conviction of an aider and abettor where the principal had been

previously acquittal, concluding that neither the language of the statute nor long-standing and relatively consistent constructions thereof supported such an exception (*id.* at 17a-21a). The court further found that (*id.* at 25a) "[n]either fairness nor justice argue for allowing these aiders and abettors to escape responsibility for their criminal activity merely because their respective principals have escaped punishments."

The court also held that nonmutual collateral estoppel did not bar petitioner's conviction (Pet. App. 26a-39a). The court noted that the application of collateral estoppel in a criminal case is not constitutionally mandated, but should apply only if it would further important policy goals or provide needed protection of defendants' rights (*id.* at 28a). In view of the number of acquittals stemming from various rules that suppress relevant evidence and the number of verdicts based on compromise or compassion, the court concluded that a verdict of not guilty in a prior case is not equivalent to a finding of innocence, that any attempt to look behind a jury verdict is fraught with difficulty (*id.* at 33a-34a), and that the application of collateral estoppel would on balance have a negative impact on the administration of criminal justice (*id.* at 28a-37a). The court concluded that although there is no way to determine the grounds for Niederberger's acquittal on several of the counts, the evidence at petitioner's trial of petitioner's guilt was overwhelming. For this reason it

concluded that fundamental fairness does not mandate the application of collateral estoppel to petitioner's case (*id.* at 38a-39a).

Judge Aldisert dissented (Pet. App. 40a-58a), concluding on two grounds that petitioner's convictions under 18 U.S.C. 2 should be reversed. He first analyzed the legislative history of 18 U.S.C. 2 and found no clear legislative intent that an aider and abettor be subject to conviction when the principal is acquitted. He therefore concluded that any ambiguity must be resolved in favor of the defendant (Pet. App. 48a-52a).[5] He further found that the conviction of an aider and abettor after acquittal of the principal results in the appearance of unequal justice and should be avoided (*id.* at 52a-58a).

Judge Gibbons dissented in a separate opinion (Pet. App. 59a-72a) on the ground that when the government had had a full and fair opportunity to litigate the issue of the principal's guilt in a prior trial the doctrine of collateral estoppel was appropriate. He was of the view that the case should be remanded to the district court for determination of that question.

SUMMARY OF ARGUMENT

18 U.S.C. 2(a) provides that "[w]hoever * * * aids, abets, counsel, commands, induces or procures [an offense against the United States] is punishable as a

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[5] Chief Judge Seitz joined in this part of Judge Aldisert's opinion.

principal." At petitioner's trial, the prosecution was able to prove beyond a reasonable doubt that petitioner aided and abetted Niederberger's receipt of gratuities from Gulf. The primary question presented by this case is whether petitioner is nevertheless entitled to a dismissal because Niederberger was acquitted in a previous prosecution. Petitioner advances two grounds for such a defense: (i) 18 U.S.C. 2 was not intended to authorize conviction of the "accessory" where the "principal" is acquitted; and (ii) the prior acquittal conclusively establishes, by virtue of the collateral estoppel doctrine, that no offense was committed, thus negating a required element of the Section 2 violation. The court of appeals correctly rejected these contentions.

I

A. The language of 18 U.S.C. 2(a) is direct, unambiguous and unqualified: "Whoever" aids or otherwise encourages a federal offense "is punishable as a principal." This language does not say that such persons are "punishable only to the extent the principal is punished" or otherwise condition their punishment on the outcome of proceedings against any other person. 18 U.S.C. 2(a) simply makes clear that any person responsible in whole or part for an offense is "punishable as a principal." In view of the statutory command that aiders and abettors be treated as principals, there is no room for adoption or perpetuation of a special rule based upon their former status at common law as accessories—a status Congress was at pains to abolish in enacting Section 2.

B. The legislative history of 18 U.S.C. 2(a) confirms that Congress intended to make each participant in a crime accountable without regard to the degree of evidence against or the ability of the government to prosecute any other participant in the offense. Prior to the enactment of 18 U.S.C. 2 in 1909, the common law and the rule observed in federal prosecutions was that all persons who aided, abetted, counseled, commanded, induced or procured a misdemeanor, or who so encouraged a felony (if present during its commission), were principals and could be prosecuted and convicted without regard to any acquittal or other outcome of any proceedings against any other participant in the crime. However, an "accessory before the fact" to a felony, *i.e.*, a participant not present at the scene of the crime, generally could not be convicted unless and until the "principal," the actual perpetrator, was convicted; and where the principal was convicted, the prosecution had to re-establish his guilt by competent proof in the subsequent proceeding against the accessory. The first of these requirements was a strict procedural bar under which an acquittal, death, or unavailability of the principal absolutely precluded any prosecution of the accessory.

The purpose of 18 U.S.C. 2 was "to make those who are accessories before the fact at common law principal offenders," thereby rendering the "obstacles to justice" imposed by the common-law procedural bar "impossible." S. Rep. No. 10 (Pt. 1), 60th Cong., 1st Sess. 13 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess. 13 (1908); 42 Cong. Rec. 586 (1908). Al-

though the legislative history did not specifically isolate the prior acquittal of the principal as one of the bars to be eliminated, that rule was simply part and parcel of the procedural bar that was being eliminated. Indeed, since the doctrine of nonmutual collateral estoppel was unheard of at the time, there would have been no reason for Congress to single out this aspect of the bar for preservation.

The legislative history is abundantly clear that Congress wished to abolish the common-law procedural bar, and it follows that Congress swept away any and all aspects of the procedural bar. Furthermore, the interpretation consistently given to 18 U.S.C. 2(a) by several courts of appeals by the time 18 U.S.C. 2(a) was amended and re-enacted in 1948 and 1951 was that a prior acquittal of one participant was of no avail to another participant. Congress is presumed to have been aware of this settled construction and to have approved it in the 1948 and 1951 legislation.

II

The doctrine of nonmutual collateral estoppel should not be extended to criminal cases. Consequently, Niederberger's acquittal did not conclusively establish, for purposes of petitioner's later trial, that no offense was committed by Niederberger. The jury in petitioner's case was entitled to reach a different conclusion as to Niederberger's guilt.

A. Nonmutual collateral estoppel is not constitutionally required. The Double Jeopardy Clause is not implicated, because the accused has not been placed in jeopardy twice. The Due Process Clause does not

require collateral estoppel even where mutuality exists, much less where it does not. *Hoag* v. *New Jersey*, 356 U.S. 464, 471 (1958).

B. Jurisprudential considerations militate against the extension of nonmutual collateral estoppel to criminal cases. Although the Court has applied nonmutual collateral estoppel to certain civil cases in order to further goals of judicial economy, criminal cases involve an altogether different consideration—the overriding public interest in complete, certain, and swift enforcement of the criminal law. That interest is subverted by any rule that spreads the effect of an erroneous acquittal to all participants in a criminal venture. Moreover, unlike the rule in civil cases, the government has no access to liberal pretrial discovery in criminal cases, no right to move for judgment notwithstanding the verdict even where an acquittal is clearly contrary to the evidence, and no right to obtain review of the correctness of such an acquittal on appeal. Unlike civil cases, therefore, the government has no recourse against verdicts based on compassion that are against the weight of the evidence. Consequently, the government does not have the same full and fair opportunity to litigate an issue that is afforded in civil procedure.

Furthermore, the introduction of nonmutual collateral estoppel to criminal cases would impose severe procedural burdens and inequities, such as the problem of deciding which of separately tried defendants must go first and the problem of determining what facts were established in previous litigation. Because there is no right to obtain review on appeal of trial

rulings adverse to the prosecution, the task of ascertaining what issues were fully and fairly resolved at the first trial would be far more burdensome than in civil cases. It is thus likely that extension of nonmutual collateral estoppel to criminal cases would waste rather than save judicial resources.

III

The jury was properly instructed that one may aid, abet, counsel, command, induce or procure the commission of a crime without necessarily entering into a conspiracy with other participants in the crime. The jury was also properly instructed that it is no defense under 26 U.S.C. 7214(a)(2) or 18 U.S.C. 201(f) that Gulf's income tax returns and reports were accurate.

ARGUMENT

I. AN AIDER AND ABETTOR MAY BE PROSECUTED UNDER 18 U.S.C. 2(a) NOTWITHSTANDING THE PRIOR ACQUITTAL OF THE ACTUAL PERPETRATOR OF THE OFFENSE

At common law, an "accessory before the fact" to a felony could not be convicted unless the "principal" (*i.e.*, the actual perpetrator of the felonious act) had previously or simultaneously been convicted. Thus, the death, escape, or acquittal of the principal felon precluded trial of the accessory. This rule was applied in federal criminal cases in the 19th century. In 1909, Congress enacted what is now 18 U.S.C. 2(a), abolishing the concept of "accessories before the fact" and ordaining that all persons aiding, abetting, counseling, commanding, inducing or

procuring offenses against the United States be treated as principals. The first question presented by this case is whether that limited aspect of the common-law procedural bar to trial of accessories to felonies foreclosing prosecution in the event of acquittal of the actual perpetrator survives as a feature of contemporary federal criminal law notwithstanding the enactment of Section 2.

A. Perpetuation Of The Common-Law Procedural Bar Relating To The Trial Of Accessories Is Contrary To The Statutory Directive Of 18 U.S.C. 2(a) That Aiders And Abettors Be Treated As Principals

In codifying the federal criminal laws in 1909, Congress adopted a provision that was the predecessor of present Section 2(a). Section 332 of the Act of March 4, 1909, ch. 321, 35 Stat. 1152, stated: "Whoever directly commits any act constituing an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." While the words "is a principal" were altered in 1951 to read "is punishable as a principal," that change was purely stylistic (see page 41, *infra*). The language of the statute plainly directs that the actual perpetrator of a criminal act and the aider and abettor be treated the same, *i.e.*, as a principal.

The wording of Section 2(a) thus allows no room for the creation or recognition of any distinction based on the accessorial status of a defendant. Since, unless this Court elects to adopt a rule of nonmutual collateral estoppel (see Part II, *infra*), the acquittal

of one principal would not bar the trial of another, the statute does not permit such an acquittal to bar the trial of an aider and abettor.[6] As we now show, this was precisely the consequence that Congress intended in enacting Section 2.

B. 18 U.S.C. 2(a) Was Enacted To Permit The Prosecution Of An Accessory Before The Fact Without Regard To The Outcome Of Any Proceedings Against The Principal

Prior to the enactment of the predecessor to 18 U.S.C. 2(a) in 1909, the federal courts had observed a common-law procedural requirement that barred conviction of an accessory before the fact to a felony

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[6] Contrary to petitioner's argument (Br. 21-22), there is no basis here for application of the rule of lenity in the construction of Section 2. Not only does the statute contain no ambiguity requiring election between a strict and a lenient reading, but the whole process of construction to which the rule of lenity applies is concerned with identification of the substantive content of a criminal prohibition. "Penal statutes are construed narrowly to insure that no individual is convicted unless 'a fair warning' [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 375 (1973), quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). See also *United States* v. *Gaskin*, 320 U.S. 527, 529 (1944); *Kordel* v. *United States*, 335 U.S. 345, 349 (1948). Petitioner had ample notice that he would be committing a federal offense if he "aided," "induced" or "procured" Niederberger's violation of Section 7214(a)(2). Inconceivable as it would be, even if petitioner knowingly committed the crime in reliance on the possibility that Niederberger would be tried first and acquitted, the fact remains that he had fair notice that his primary conduct was forbidden. The rule of lenity requires no more.

prior to the conviction of the actual perpetrator. One consequence of this rule was that an acquittal of the actual perpetrator absolutely precluded any conviction of the accessory inasmuch as the principal could never thereafter be convicted. It is undisputed in this case that the legislative history of 18 U.S.C. 2(a) demonstrates a purpose to sweep away the common-law procedural bar and to treat accessories before the fact as principals. Petitioner contends (Br. 22-23), however, as did Judge Aldisert below (Pet. App. 50a-51a), that the failure of the legislative history expressly to state that a prior acquittal of the actual perpetrator would no longer bar prosecution of the accessory suggests that Congress meant to preserve this consequence of the common-law rule.

Although it is unnecessary for Congress to repeat in its committee reports what is already evident from the statutory language, it is quite clear, when the reports are read in their contemporaneous historical context, that Congress intended a complete abolition of the common-law procedural rule. Accordingly, we now turn in some detail to the common-law rule, its application in the federal courts prior to 1909, and the contemporaneous movement to abolish the common-law rule by Congress for the District of Columbia and Alaska and by state and territorial legislatures.

1. *The Common-Law Rule*

At common law, persons responsible for a felony were classified as follows: (1) principal in the first degree (the actual perpetrator of the offense); (2)

principal in the second degree (one actually present at the crime and aiding or abetting its commission); (3) accessory before the fact (one who counsels, procures, commands, or induces the commission of the crime, but is not present at the scene); and (4) accessory after the fact (one who, knowing a crime has been committed, thereafter aids or assists a principal). See W. LaFave & A. Scott, *Criminal Law* § 63, at 495 (1972); W. Clark & Marshall, *Crimes* §§ 8.01-8.03 (7th ed. 1967); 1 H. Brill, *Cyclopedia of Criminal Law* §§ 218-249 (1922); 4 W. Blackstone, *Commentaries on the Laws of England* 33 (1765). A felony was any crime punishable by forfeiture and death.

Because all four classifications of felons received the death penalty, strict requirements were imposed in the prosecution of accessories. Among these were (i) a procedural requirement that, absent the accessory's consent (or outlawry of the principal), an accessory before or after the fact could not be convicted without the prior or simultaneous conviction of the principal offender for the same or a higher degree of crime, and (ii) a substantive requirement that in the trial of the accessory the prosecution prove that a crime had, in fact, been committed by the principal.[7] Under the procedural requirement,

[7] A judgment of conviction of the principal was merely prima facie, rebuttable proof of the guilt of the principal. R. Perkins, *Criminal Law* 654-676 (2d ed. 1969); W. LaFave & A. Scott, *supra*, at 498-501; W. Clark & Marshall, *supra*, § 8.05, at 523; 1 H. Brill, *supra*, § 253, at 454; *United States* v. *Marshall*, 26 F. Cas. 196, 201 (C.C.D. Mass. 1869) (No. 15,318).

the flight, death, or acquittal of the principal was an absolute bar to the prosecution of the accessory. In short, the accessory "followed his principal like a shadow." J. Bishop, *New Criminal Law* § 666 (8th ed.).

Significantly, these rules had limited application. Thus, the trial of a principal in the second degree was not limited by the procedural bar. Therefore, a prior acquittal of the principal in the first degree did not block the prosecution of this type of accessory. The guilt of the principal in the first degree still had to be proven, however, in the trial of the principal in the second degree. The principal in the second degree could also be convicted of a higher degree of crime (*e.g.*, murder) than the principal in the first degree (*e.g.*, manslaughter) so long as the prosecution proved the higher-degree crime had been committed. W. Clark & Marshall, *supra*, § 8.02, at 507-508, 521; R. Perkins, *supra*, at 670-671; W. LaFave & A. Scott, *supra*, at 500.

All parties responsible for misdemeanors, which were not capital offenses, were deemed principals. There were no accessories to a misdemeanor. Each person who aided, counseled, or induced the crime could be tried and convicted without respect to the outcome of any action taken against the actual perpetrator of the offense. *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1944); *United States* v. *Hartwell*, 26 F. Cas. 196 (C.C.D. Mass. 1869); W. LaFave & A. Scott, *supra*, at 496; 22 C.J.S. *Criminal Law* § 81, at 241-242 (1961); 1 M. Hale, *Pleas of the Crown* 623 n.2 (1847). Thus, for misdemeanors, one who

would be an accessory if the crime were a felony could be convicted even after the "principal" had been acquitted. *R.* v. *Burton*, 13 Cox, C. C. 71 (1875); *R.* v. *Humphreys and Turner*, [1865] 3 All E. R. Rep. 689. Nor was collateral estoppel any bar to such a prosecution—even where the same ultimate facts were in issue—because the mutuality requirement was firmly entrenched as part of the collateral estoppel doctrine. See *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912).

2. *The 19th Century Federal Rule*

The common law of principals and accessories generally prevailed in federal prosecutions prior to 1909.[8] Thus, even where a federal statute prohibited

[8] *E.g.*, *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 475-476 (1827) ("aiding and abetting" as used in statute construed to be a misdemeanor, thereby dispensing with any need to convict principal first; all parties to misdemeanors are principals); *United States* v. *Mills*, 32 U.S. (7 Pet.) 137, 141 (1833) (all parties to misdemeanors are principals); *United States* v. *Williams*, 28 F. Cas. 645, 646 (C.C.D.C. 1804) (No. 16,708) (same); *United States* v. *Burr*, 25 F. Cas. 55, 177-178 (C.C.D. Va. 1807) (No. 14,693) ("[I]f the guilt of B depends on the guilt of A, A must be convicted before B can be tried"); *United States* v. *Wilson*, 28 F. Cas. 699, 709-710 (C.C.E.D. Pa. 1830) (No. 16,730) (all participants present at a crime are principals); *United States* v. *White*, 28 F. Cas. 550, 556 (C.C.D.C. 1836) (No. 16,675) (one absent from crime but concerned in its design is an accessory before the fact); *United States* v. *Libby*, 26 F. Cas. 928, 931 (C.C.D. Me. 1846) (No. 15,597) (all participants present at a crime are principals); *United States* v. *Crane*, 25 F. Cas. 691 (C.C.D. Ohio 1847) (No. 14,888) ("If the principal is acquitted, the accessory must be discharged"); *United States* v. *Douglass*, 25 F. Cas. 896, 898 (C.C. S.D.N.Y. 1851) (No. 14,989) (all persons present and assisting at a felony are principals); *Charge to Grand Jury*, 30 F. Cas. 983, 984-985 (C.C.D. Mass. 1854) (No. 18,250) (all parties to a misdemeanor are principals); *United States* v. *Hartwell*, 26 F. Cas. 196, 198-203 (C.C.D. Mass. 1869) (No. 15,318) (all parties to misdemeanor are principals; assistants present at a crime are principals; in joint trial, jury must first determine guilt of principal and must acquit accessory if it acquits the principal; conviction or confession of absent principal admissible against accessory to establish principal's guilt); *United States* v. *Snyder*, 14 F. 554, 556 (D. Minn. 1882) (although only a postmaster could commit the offense, his aiders and abettors may be convicted as principals because the crime is a misdemeanor); *Gallot* v. *United States*, 87 F. 446, 448 (5th Cir. 1898) (unnecessary to convict principal first because statute specified that aiding and abetting the offense was a misdemeanor); *United States* v. *Williams*, 159 F. 310, 311-312 (N.D. Ala. 1908) (misdemeanor statute applies to all aiders and abettors, whether present or not, even though statute does not mention aiding and abetting).

certain acts, expressly including aiding, abetting, counseling or procuring the ultimate act itself, it was presumed that the various parties to the crime retained their common-law status. Consequently, the courts generally held that, absent consent, no trial of the accessory to a felony could precede the trial and conviction of the principal. *United States* v. *Crane*, 25 F. Cas. 691 (C.C.D. Ohio 1847) (No. 14,888); *United States* v. *Hartwell*, 26 F. Cas. 196, 199 (C.C.D. Mass. 1869) (No. 15,318). The procedural problem would have been more serious than it was had Congress not "in numerous instances expressly declared certain offenses to be misdemeanors to which it nevertheless attached the penalty of imprisonment for long terms of years," thereby avoiding the difficulties presented by the principal-accessory distinction

for felonies. *Final Report of the Commission to Revise and Codify the Laws of the United States* 199 (1906).[9]

3. *The Movement Away From the Common-Law Rule*

In time, the procedural requirement of a prior or simultaneous conviction of a principal in order to convict an accessory to a felony proved too severe. It prohibited the punishment of persons obviously responsible, at least in part, for crimes, merely because there was insufficient proof to convict the actual perpetrators or because the convictions of the "principals" could not be obtained due to death or unavailability. As the number of capital felonies decreased, the incentive to perpetuate the procedural bar diminished.[10] The 19th century and early 20th century witnessed a marked legislative trend toward the abrogation of the common-law distinctions among parties to felonies and the elimination of the procedural requirement of

[9] Cases in which the procedural bar was avoided by denominating the offense a misdemeanor include *United States* v. *Gooding, supra,* 25 U.S. (12 Wheat) at 475-476; *United States* v. *Mills, supra,* 32 U.S. (7 Pet.) at 141; *United States* v. *Williams, supra,* 28 F. Cas. at 646; *Charge to Grand Jury, supra,* 30 F. Cas. at 984-985; *United States* v. *Hartwell, supra,* 26 F. Cas. at 198-199.

[10] An 1861 English statute provided that an accessory before the fact could be "indicted, tried, convicted, and punished in all respects as if he were a principal Felon" and that he could be "indicted and convicted of a substantive Felony, whether the principal Felon shall or shall not have been previously convicted, or shall or shall not be amenable to Justice." The Accessories and Abettors Act, 24 & 25 Vict. c. 94 (1861).

a prior or simultaneous conviction of the "principal" in order to convict the "accessory." [11]

Congress joined this movement away from the common-law rule. In 1901, for example, Congress enacted a general penal code for the District of Columbia unambiguously abolishing the common-law procedural bar in its entirety. The code provided, among other things, that all persons "advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals, not as accessories, *the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes* * * *." Act of March 3, 1901, ch. 854, Section 908, 31 Stat. 1337; D.C. Code § 22-105 (1976) (emphasis added). As a result, the acquittal of any persons responsible for either a misdemeanor or a felony in the District of Columbia in no way discharged any other person responsible for the crime.[12]

This enactment was part of a general movement in America to abolish the procedural bar. By the time 18 U.S.C. 2 was enacted in 1909, numerous state and

[11] Other antiquated rules in the prosecution of accessories were also modified by such legislation. The common law required the acquittal of one charged as an accessory if the jury found him to have been a principal, and vice-versa. The common law also imposed strict venue requirements on the trial of accessories. These pleading and venue pitfalls were eliminated in most states by statutes allowing the jury to convict one alleged to have been an accessory as a principal and vice-versa and relaxing venue. See generally R. Perkins, *supra,* at 671-672, 677.

[12] Congress had accomplished a similar result for Alaska 1899. See note 14, *infra.*

territorial legislatures had already removed the procedural bar, and at least 14 state or territorial statutes expressly provided (or were construed to have provided) that the acquittal of an accused who at common law would have been charged as a principal was no bar to conviction of one charged with aiding and abetting the crime.[13]

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[13] By 1909, several state statutes providing that a prior or simultaneous conviction of the principal was unnecessary to prosecute a common-law accessory also expressly provided that an acquittal of the principal did not bar prosecution or conviction of a common-law accomplice. *E.g.*, Del. Laws (Rev. Code) §§ 2919-2921 (1852); Okla. Stat. § 5523 (1890); Mont. Codes Ann. (Penal Code) § 1854 (1895); N.D. Rev. Codes § 8060 (1895); S.D. Ann. Stat. § 8520 (1899); Utah Comp. Laws § 4752 (1907); Ariz. Rev. Stat. (Penal Code) §§ 845-846 (1901).

Other statutes that simply provided, as did the 1909 enactment of 18 U.S.C. 2, that any person who counseled, commanded, induced or procured another to commit a crime "is a principal" or might be tried or punished "as if a principal," or words to that effect, were construed to authorize a prosecution and conviction of common-law accomplices despite acquittals of the common-law principals. *E.g.*, *People* v. *Bearss*, 10 Cal. 68, 69-70 (1858) (Cal. Stat. ch. 99, §§ 11-12 (1850)); *State* v. *Gifford*, 19 Wash. 464, 467-468, 53 P. 709, 710 (1898) (Wash. Code of Proc. § 1189 (1891)); *State* v. *Bogue*, 52 Kan. 79, 86-87, 34 P. 410, 412 (1893) (Kan. Gen. Stat. § 5180 (1889)); *State* v. *Patterson*, 52 Kan. 335, 352, 34 P. 784, 790 (1893); *State* v. *Lee*, 91 Iowa 499, 501-502, 60 N.W. 119, 120 (1894) (Iowa Rev. Code § 4314 (1882); *People* v. *Kief*, 126 N.Y. 661, 663-664, 27 N.E. 556, 557 (1891) (N.Y. Penal Code § 29 (1895)); *People* v. *Beintner*, 168 N.Y.S. 945, 947-948 (1918) (same); *People* v. *Smith*, 271 Mich. 553, 557-558, 260 N.W. 911, 913-914 (1935) (Mich. Comp. Laws § 17253 (1929)); *People* v. *Mangiapane*, 219 Mich. 63, 65-66, 188 N.W. 401, 402 (1922) (Mich. Comp. Laws § 15757 (1915)).

Another form of statute simply provided that accessories could be tried, whether or not the principal had been previously convicted, and should be punished to the same extent as principals. Several statutes of this type were construed to authorize conviction of a common-law accessory despite the acquittal of a common-law principal. *E.g.*, *Cummings* v. *Commonwealth*, 221 Ky. 301, 313, 298 S.W. 943, 948 (1927) (Ky. Stat. § 1128 (1903)); *Commonwealth* v. *Hicks*, 118 Ky. 637, 642, 82 S.W. 265, 266 (1904) (same); *Fleming* v. *State*, 142 Miss. 872, 880-881, 108 So. 143, 144-145 (1926) (Miss. Code § 1026 (1906)). But see *People* v. *Wyherk*, 347 Ill. 28, 31-32, 178 N.E. 890, 891-892 (1931); *McCarty* v. *State*, 44 Ind. 214, 216-217 (1873); *Pierce* v. *State*, 130 Tenn. 24, 44-47, 168 S.W. 851, 856 (1914); cf. *State* v. *St. Philip*, 169 La. 468, 125 So. 451 (1929). See generally Sears, *Principals and Accessories—Some Modern Problems*, 25 Ill. L. Rev. 845 (1931); Orfield, *Criminal Law—Parties—Principal and Accessory—Effect of Statute Providing For Similar Prosecution and Punishment*, 10 Neb. L. Bull. 170 (1931); Note, *Conviction of an Accessory After Acquittal of the Principal*, 18 Colum. L. Rev. 471 (1918).

4. *The Enactment of 18 U.S.C. 2(a)*

18 U.S.C. 2(a) was enacted as part of a comprehensive recodification of federal criminal law in 1909. In 1897, Congress established the Commission to Revise and Codify the Criminal and Penal Laws of the United States. Act of June 4, 1897, ch. 2, 30 Stat. 58. During the period from 1898 to 1906, the Commission issued three reports concerning federal penal laws, consistently making three related recommendations: (i) that felony be redefined to include all serious offenses; (ii) that the term "accessory" be confined to those who, after the commission of a crime,

In the United States today, virtually all states have abrogated the distinction between principals and accessories before the fact. W. LaFave & A. Scott, *supra*, at 500. The Model Penal Code and many states hold that an acquittal of the common-law principal is no bar to the prosecution of the aider and abettor. See *Model Penal Code* § 2.04 (Tent. Draft No. 1, 1953), and state laws cited therein.

harbor or conceal the criminal; and (iii) that all other persons concerned in the commission of felonies as well as misdemeanors—before or at the fact—be tried and punished as principals.

The latter two recommendations were "[i]n accordance with the policy of recent legislation" by which "those whose relations to a crime would be that of accessories before the fact according to the common law are made principals." *Final Report of the Commission to Revise and Codify the Laws of the United States* 118-119 (1906); *Report of the Commission to Revise and Codify the Laws of the United States* S. Doc. No. 68, 57th Cong., 1st Sess. (Pt. 2) XXXI (1901). Concerning the first recommendation, the Commission observed that the word "felony" had "lost the significance which it possessed under the common law, namely, an offense which occasions a forfeiture of either lands or goods." *1906 Report* at 119; *1901 Report* at XXXI. Because the word "felony" appeared frequently in the laws of the United States, the Commission recommended that it be redefined to include any crime punishable by imprisonment for more than one year. *1906 Report* at 119; *1901 Report* at XXXI. The Commission did not suggest in any way that the redesignation of crimes previously deemed to be misdemeanors would render them subject to the common-law procedural bar, nor did it in any other way associate the redesignation with the common-law procedural bar.[14]

[14] The Commission submitted three reports. Each made the three recommendations described in the text, although in progressively different language. The first was contained in the Commission's proposed code for Alaska in 1898, see S. Doc. No. 60, 55th Cong., 2d Sess. 55 (1898), which was enacted as recommended. Act of March 3, 1899, ch. 429, Sections 184-187, 30 Stat. 1282. The second was contained in the Commission's proposed codification of federal criminal laws in 1901. Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, S. Doc. No. 68 (Pt. 2), 57th Cong., 1st Sess. 129 (1901). At that time, no final action was taken on bills embodying the proposals by Congress. *1906 Report* at 2. The third was the Commission's final report in 1906, which proposed the precise language adopted by Congress in 18 U.S.C. 2 in 1909. See *1906 Report* at 118-119, 1844.

Shortly after the Commission submitted its final report to Congress, the House and Senate established a joint committee to consider the report and make recommendations concerning it to Congress. See 42 Cong. Rec. 725 (1908). Although the joint select committee redrafted the code proposed by the Commission without incorporating many of the reforms suggested by the Commission, the committee accepted the three recommendations described above. S. Rep. No. 4825, 59th Cong., 2d Sess. (Pt. 1 at 11 and Pt. 2 at 11) (1907); S. Rep. No. 10, 60th Cong., 1st Sess., Pt. 1 at 12-13 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess. 12-13 (1908); see 42 Cong. Rec. 585 (1908).

First, the committee bill (Section 329) adopted without change the Commission's recommendation to designate any person who "aids, abets, counsels, commands, induces, or procures" the commission of "an offense" as "a principal." S. Rep. No. 10 (Pt. 2), *supra*, at 356. In identical language, the House and

Senate committee reports stated (S. Rep. No. 10 (Pt. 1), *supra*, at 13; H.R. Rep. No. 2, *supra*, at 13; 42 Cong. Rec. 586 (1908)):[15]

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[15] In the only floor colloquy concerning Section 329, Senator Heyburn stated that Section 329 was "new legislation in effect" and that "[m]any States [had] adopted this provision in order that the party who is an accessory may be punished without waiting for the punishment of the principal." 42 Cong. Rec. 1374 (1908).

The section-by-section analysis of the committees' report stated merely that Sections 329 and 330 (concerning accessories after the fact) were "new only in the sense that they are made general in their application. They explain themselves." S. Rep. No. 10 (Pt. 1), *supra*, at 26; H.R. Rep. No. 2, *supra*, at 26. Concerning Section 329, this was a reference to Sections 5323 and 5427 of the Revised Statutes. See the marginal notations in the bill at S. Rep. No. 10 (Pt. 2), *supra*, at 356-357. Section 5323 provided:

> Every person who knowingly aids, abets, causes, procures, commands, or counsels another to commit any murder, robbery, or other piracy upon the seas, is an accessory before the fact to such piracies, and every such person being thereof convicted shall suffer death.

Section 5427 provided:

> Every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections, or attempts to do any act therein made felony, or counsels, advises, or procures, or attempts to procure, the commission thereof, shall be punished in the same manner and to the same extent as the principal party.

These provisions were made "general" in the sense that aiding, assisting, counseling, commanding or procuring the commission of any federal offense were made offenses. Section 329, however, did not follow the form of Section 5323, which retained the term "accessory before the fact" and simply pro-

The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.

At common law an accessory can not be tried without his consent before the conviction or outlawry of the principal except where the principal and accessory are tried together; if the principal

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vided that such accessories would suffer the death penalty. Arguably, therefore, Section 5323 was subject to the common-law procedural requirement that the principal be first or simultaneously convicted in order to convict the accessory. On the other hand, Section 5427 did not use the term "accessory" but simply punished those who aided, abetted, counseled, advised or procured the federal felony mentioned "in the same manner and to the same extent as the principal party." In any event, whatever role the procedural bar of the common law played in prosecutions under Sections 5323 and 5427, it is clear that Congress intended to dispense with the procedural bar in 18 U.S.C. 2(a). What was made "general" about Sections 5323 and 5427 was the extension of liability for all federal crimes to all who brought them about. This eliminated the need for each federal statute expressly to refer to those who aid, abet, counsel, command, or procure the crime. The absence of such words in certain statutes had previously resulted in dismissals of indictments for counseling, commanding or procuring a crime. See, *e.g.*, *United States* v. *Ramsay*, 27 F. Cas. 694, 695 (D. Ark. 1847) (No. 16,115) (no federal statute punishes an accessory before the fact to murder). But see *United States* v. *Stevens*, 44 F. 132, 140 (D. Minn. 1890) (dictum). In this connection, although several other penal sections in the Revised Statutes expressly punished "aiding" or "aiding or abetting" (or similar wording), see R.S. 5335, 5354, 5364, 5415, 5441, 5455, 5463, 5466, 5470, 5477, 5479, 5498, 5511, 5512, 5515, 5516, 5525, 5526, none contained the comprehensive enumeration of aiding, abetting, counseling, commanding, advising or procuring incorporated from R.S. 5323 and 5427 into 18 U.S.C. 2(a).

could not be found or if he had been indicted and refused to plead, had been pardoned or died before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible.

Second, the committee adopted, although in modified language, the Commission's proposal to retain the category of "accessory after the fact" to any "offense" and to prescribe punishment of up to one-half the severity of the punishment of the principal. This was the only provision in the code mentioning the word "accessory." It was limited to accessories "after the fact." All other parties to "offenses" were "principals." S. Rep. No. 10 (Pt. 1), *supra*, at 13; H. R. Rep. No. 2, *supra*, at 13; 42 Cong. Rec. 586 (1908).

Third, as observed by the chairman of the joint select committee, Representative Moon, the committee bill, by comparison to existing law, "omitted the designation of offenses in the sections as either *felonies* or *misdemeanors* [emphasis in original], in other words [we] have abolished the existing arbitrary distinction between felonies and misdemeanors." 42 Cong. Rec. 585, 586 (1908)). Representative Moon's explanation of the procedural significance of the distinction between felonies and misdemeanors in the prosecution of offenses made no mention of any common-law procedural bar. This omission suggests that Congress did not intend, in redesignating misdemeanors as felonies, to introduce the procedural bar into the prosecution of those who aided or abetted the commission of what were redesignated as felonies

under the new code. See S. Rep. No. 10, *supra* (Pt. 1 at 12, 26 and Pt. 2 at 358 (Section 332)); H. R. Rep. No. 2, *supra*, at 12, 26.

In sum, 18 U.S.C. 2(a) was enacted to hold accountable all persons responsible for an offense against the United States, regardless of their whereabouts at the time of the crime and regardless of the degree of proof available to convict others also responsible for the offense or the ability of the government otherwise to bring them to justice.[16] This had always been the rule for misdemeanors and for all participants present at the felony. To extend this rule to all persons responsible for the offense,

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[16] These provisions were enacted (Act of March 4, 1909, ch. 321, 35 Stat. 1152) as follows:

Sec. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Sec. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.

* * * * *

Sec. 335. All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.

including those not present at the commission of what was previously a felony, Congress simply "abolishe[d] the distinction between principals and accessories [before the fact] and [made] them all principals." *Hammer* v. *United States*, 271 U.S. 620, 628 (1926) (referring to 18 U.S.C. 2(a)). No longer was one a principal to a "felony," a term which ceased to have any anchor in its common-law meaning, but to an "offense." The only "accessories" to survive the purge were accessories *after* the fact. The category of "accessory before the fact"—whose treatment at common law is the essential predicate of petitioner's theory—simply ceased to exist. This was the scheme recommended by the Commission in 1898, 1901 and 1906 and enacted by Congress in 1898 for Alaska and 1902 for the District of Columbia, and the scheme proposed by the joint committee in 1908 and enacted as 18 U.S.C. 2(a).

In discussing the meaning of the 1909 enactment, both petitioner (Br. 22-23) and the dissent of Judge Aldisert (Pet. App. 50a-51a) emphasize the absence from the House and Senate Reports of any statement of intent specifically to eliminate that aspect of the common-law procedural bar that precluded trial of an accessory to a felony if the principal had been acquitted. It is suggested that this omission, when other accomplishments of the new section were specified, signifies an intent to retain that aspect of the common-law rule. There are a number of grave obstacles to that argument:

(a) As noted above, the concept of "felony" was totally detached from its common-law meaning and redefined much more broadly, sweeping within its ambit large numbers of offenses that were theretofore denominated misdemeanors. As to all of these offenses, there were prior to 1909 no restrictions regulating trials of "accessories." Indeed, the version of Section 7214 then in effect (R.S. 3169 (1878)) was specifically stated to be a misdemeanor, so that, had petitioner's trial occurred in 1908, it is plain that Niederberger's acquittal would not have barred his prosecution.[17] Thus, the consequence of Judge Aldisert's interpretation of the 1909 legislation would be that Congress created a *new* bar to prosecution of aiders and abettors in a fairly large class of cases—including prosecutions under Section 7214—where no such bar theretofore existed. It would be more than strange to hold that Congress, stating that it intended to sweep away old barriers to prosecution of

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[17] Indeed, even had Section 7214 been classified as a felony, it is doubtful that the common-law rule would have aided petitioner. It will be recalled that an aider and abettor who was present at the scene of the felony was treated as a principal and could be convicted without the need of a prior or contemporaneous conviction of the actual perpetrator. On four of the five trips, petitioner joined Niederberger and thus was, in a sense, present while Niederberger was committing the offense (Tr. 1018-1020, 1024-1027, 1034-1036, 1096). While we do not suggest that any such consideration should govern the outcome of this case, we do believe that this point further illustrates the unreasonableness of a conclusion that Congress meant to carry forward the common-law procedural bar, with all its idiosyncracies, even in the case where the actual perpetrator of the offense has for one reason or another been acquitted.

accessories and employing language suited to that purpose, in fact was creating new barriers to prosecution in connection with all the offenses that it was reclassifying from misdemeanor to felony.

(b) The notion that underlies Judge Aldisert's view is that in 1909 Congress, while justifiably wishing to sweep away most of the procedural bar to trial of accessories, would have thought twice before eliminating the aspect that precluded trial of the accessory after acquittal of the principal. Having said nothing on that point, the argument goes, Congress ought not to be assumed to have taken such a step. This analysis looks at the 1909 enactment through 1979 glasses, based as it is on the assumption that Congress must necessarily have hesitated before withdrawing from one charged as an aider and abettor the benefit of a nonmutual collateral estoppel. But in 1909 the doctrine of nonmutual collateral estoppel was not even a gleam in legal scholars' eyes: mutuality was a clear precondition to estoppel, even in civil cases. See *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912). And as we have noted, prior to 1909 an acquittal of the principal would not have barred the subsequent conviction of another principal to the same offense, of an "accessory" who was present at the offense, or of any party to the offense if it was a misdemeanor. Given this background, combined with Congress' explicit purpose to treat what were formerly accessories before the fact as principals, it is simply untenable to suppose that Congress perpetuated, sub silentio, a prin-

ciple of nonmutual collateral estoppel that was unknown elsewhere in the law of the day and that had its common-law roots solely in the very distinction between accessories and principals that Congress was abolishing.

(c) In essence, Judge Aldisert's position hinges upon the extent to which *silence* in the legislative history can legitimately be taken to modify the apparent plain meaning of the language of the statute itself. As we have just discussed, it is in fact extremely unlikely that the congressional silence on the point here at issue could have had the significance ascribed to it, in view of the common understanding of the law at the time. But even if that were less clear, we believe the majority's criticism (Pet. App. 13a-14a) of this method of statutory construction—applying the maxim of expressio unius, exclusio alterius to the legislative history rather than to the statutory text—is well taken.[18]

C. The 1948 And 1951 Reenactments Of 18 U.S.C. 2(a) Confirm The Correctness Of The Interpretation Of The 1909 Enactment As Abolishing The Procedural Bar In its Entirety

In 1948 and 1951 Congress amended and reenacted 18 U.S.C. 2(a). These actions, we submit, served to confirm that the 1909 enactment simply obliterated

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[18] Indeed, Judge Aldisert's approach is precisely like the approach taken by the District of Columbia Circuit to avoid the plain meaning of the language at issue in *Palmore* v. *Superior Court of the District of Columbia*, 515 F.2d 1294 (1975). That statutory construction was rejected by this Court in *Swain* v. *Pressley*, 430 U.S. 372 (1977).

prior distinctions between accessories before the fact and principals.

The 1948 amendment added Section 2(b) (62 Stat. 684):

> Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

This provision was added to eliminate any doubt that "one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or intrumentality, is guilty as a principal." H.R. Rep. No. 304, 80th Cong., 1st Sess. A5 (1947).[19]

In 1951, Congress re-enacted 18 U.S.C. 2 with a set of changes designed to eliminate all doubt that—in the case of offenses whose prohibitions are directed

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[19] The House report stated (H.R. Rep. No. 304, *supra,* at A5):

> The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.
>
> It removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

See also H.R. Rep. No. 152 (Pt. 2), 79th Cong., 2d Sess. A3 (1946); H.R. Rep. No. 152 (Pt. 1), 79th Cong., 1st Sess. A3 (1945); S. Rep. No. 1620, 80th Cong., 2d Sess. (1948).

at members of specified classes (*e.g.*, bank officer, federal employee, union official, etc.)—one who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in the class to violate such prohibitions. To make this clear the 1951 amendment, among other things, changed the phrase "is a principal" in Section 2(a) to "is punishable as a principal." Act of October 31, 1951, ch. 655, Section 17b, 65 Stat. 717.[20]

By the time of these re-enactments, every court of appeals to have considered the issue had construed 18 U.S.C. 2(a) to authorize conviction of one who aided, abetted, counseled, commanded or procured a federal offense as a principal even though the actual perpetrator was acquitted. *Rooney* v. *United States*, 203 F. 928, 931-932 (9th Cir. 1913); *Kelly* v. *United*

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[20] The Senate Report stated:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.
>
> * * * It has been argued that one who is not a bank officer or employee cannot be a principal offender in violations of section 656 or 657 of title 18 and that, therefore, persons not bank officers or employees cannot be prosecuted as principals under section 2(a).

S. Rep. No. 1020, 82d Cong., 1st Sess. 7-8 (1951) (footnotes omitted).

States, 258 F.2d 392, 402 (6th Cir. 1919); *Von Patzoll* v. *United States*, 163 F.2d 216 (10th Cir.), cert. denied, 332 U.S. 809 (1947); *United States* v. *Klass*, 166 F.2d 373, 380 (3d Cir. 1948).[21] Moreover, although this Court had not yet had occasion to pass on the precise issue here by the time of the reenactments, it had observed that 18 U.S.C. 2 "abolishes the distinction between principals and accessories and makes them all principals." *Hammer* v. *United States*, 271 U.S. 620, 628 (1926). See also *Ruthenberg* v. *United States*, 245 U.S. 480, 483 (1918); *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949); *United States* v. *Hodorowicz*, 105 F.2d 218, 220 (7th Cir. 1939).

Where, as here, Congress amends and re-enacts a specific provision and does not disturb a settled judicial construction of an unamended aspect of the pro-

[21] The only arguably contrary authority was the decision of the district court in *United States* v. *Pyle*, 279 F. 290 (S.D. Cal. 1921), holding that the acquittal of the "principal" in a joint trial required an acquittal of the aider and abettor by the same jury. That decision did not rest, however, on the theory that any vestige of the common-law procedural bar remained. Instead, *Pyle* held that under 18 U.S.C. 2(a) the government must prove as an element of the offense that a crime was committed and that a jury could not reach inconsistent verdicts on this issue as to different participants in the crime. Well before the reenactment of 18 U.S.C. 2(a) in 1948 and 1951, this Court had rejected any requirement for consistent verdicts in the same trial. *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). Thus, by 1948 the *Pyle* decision was a dead letter.

vision, it should be presumed that Congress has approved that construction. *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).[22]

[22] Since 1951, the clear weight of authority among the courts of appeals has confirmed that a prior acquittal of a principal does not discharge common-law accessories before the fact. See Pet. App. 17a-21a. See also *United States* v. *Ruffin*, No. 78-1361 (2d Cir. Dec. 28, 1979) (18 U.S.C. 2(b) authorizes conviction of one who procures a crime through an innocent principal). The contrary view of the Fourth Circuit in *United States* v. *Shuford*, 454 F.2d 772 (1971), and *United States* v. *Prince*, 430 F.2d 1324 (1970), rests on a misreading of *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963). That decision reversed a state aiding-and-abetting conviction after the principals' convictions were reversed on the ground that their conduct was constitutionally protected. The Court reasoned that "there can be no conviction for aiding and abetting someone to do an innocent act." *Id.* at 265. As a matter of law, the prosecution's factual allegations therefore did not charge a punishable offense.

The Fourth Circuit misconstrued *Shuttlesworth* as holding that once the principal is acquitted by one jury, regardless of the reason for the acquittal, the aider and abettor may not be tried even though the evidence is sufficient to demonstrate conduct by the principal constituting a crime. The Fourth Circuit's position essentially applies the doctrine of nonmutual collateral estoppel. *Shuttlesworth* plainly did not go so far. The Court could only have imposed such a rule on the states on authority of the Constitution. This Court has held that nonmutual collateral estoppel is not constitutionally compelled (see page 46, *infra*), and *Shuttlesworth* in no wise indicates to the contrary. The lower court decisions cited in *Shuttlesworth* (373 U.S. at 265-266) held only that in a prosecution for aiding and abetting, the prosecution must prove the guilt of the principal.

II. THE DOCTRINE OF NONMUTUAL COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED IN A FEDERAL CRIMINAL CASE

In the preceding section of this brief we have argued that the common-law procedural bar against trial of an accessory prior to conviction of the principal did not survive the enactment of the 1909 statute eliminating the distinction between principals and accessories before the fact—even in the circumstance, as here, where the principal has been acquitted prior to the trial of the aider and abettor. The common-law rule under which the accessory could not be tried after acquittal of the principal was not in any way an application of the doctrine of collateral estoppel, since the bar to prosecution of the accessory applied quite without regard to the existence of any prior litigation (and since at the time collateral estoppel was possible only when the parties to the second litigation were the same as the parties to the first). Moreover, the position taken in Judge Aldisert's dissent in the court of appeals, proposing recognition of the common-law rule in the circumstances here, does not appear to represent a true application of collateral estoppel against the United States, since the estoppel effect of the principal's acquittal would not appear to depend on the existence of a full and fair opportunity to litigate particular factual issues at the trial of the principal.

Judge Gibbons, in his dissent, did not endorse Judge Aldisert's or the Fourth Circuit's view that special rules relating to the trial of aiders and abettors bar such prosecutions in the face of a prior

acquittal of the principal. Rather, he advanced a principle both more novel and more sweeping in its potential scope—the application of nonmutual collateral estoppel against the government in criminal cases. Under his view (Pet. App. 60a-61a), the ability of the government to maintain this prosecution of petitioner following Niederberger's acquittal would depend upon whether the acquittal of Niederberger entailed findings of fact adverse to the government, after a full and fair opportunity to litigate those facts, that are indispensable to petitioner's conviction. It is important to emphasize that this position does not depend at all on the fact that petitioner was charged and convicted solely as an aider and abettor in the counts in question here; collateral estoppel, if applicable, could equally foreclose trial of a principal after acquittal of another principal or even trial of an actual perpetrator of an offense after acquittal of an aider and abettor.

For the reasons we now set forth, we submit that it would be unwise to extend the doctrine of nonmutual collateral estoppel from civil to criminal cases.[23]

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[23] Petitioner did not assert the applicability of the doctrine of collateral estoppel at the time of trial, but only claimed generally that three counts of his indictment should be dismissed because the alleged principal had been acquitted. The issue was raised for the first time on appeal and addressed reluctantly by the court of appeals, which expressed doubt "whether the issue can fairly be said to have been raised below or preserved on appeal" (Pet. App. 27a n.44).

A. Nonmutual Collateral Estoppel Is Not Constitutionally Required

The Constitution does not bar petitioner's Section 7214 convictions even if they rest in part on facts determined against the United States in Niederberger's separate trial, to which petitioner was not a party. Although the Double Jeopardy Clause incorporates the concept that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties * * *," *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), that concept has no place here because petitioner had not litigated his guilt at Niederberger's trial. In short, having not previously been placed in jeopardy,[24] he cannot complain of double jeopardy. Nor does the Due Process Clause compel recognition of the defense of collateral estoppel in these circumstances. *Hoag* v. *New Jersey*, 356 U.S. 464, 471 (1958), expressed "grave doubts" that, even where mutuality existed, collateral estoppel was compelled by the Due Process Clause; it upheld a robbery conviction despite the fact that the same defendant had been previously acquitted on a charge identical in all material respects. A fortiori, a defendant in a criminal case has no due process right to invoke factual determinations in litigation to which he was not a party.

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[24] "The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

B. The Judge-Made Doctrine of Nonmutual Collateral Estoppel Should Not Be Extended To Criminal Cases

The question in this case thus reduces to whether the doctrine of nonmutual collateral estoppel ought to be extended in light of jurisprudential considerations of nonconstitutional magnitude to federal criminal procedure. For many years this Court, relying on nothing more than jurisprudential and historical considerations, refused to allow relitigation in the federal courts of an issue fully and fairly determined in a prior suit between the same parties (or by persons in privity with them).[25] This was true in both civil and criminal cases. See, *e.g.*, *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 316-321 (1818); *Coffey* v. *United States*, 116 U.S. 436, 442-445 (1886); *In re Neilsen*, 131 U.S. 176, 187-190 (1889); *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 48-50 (1897) (and cases cited therein); *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916); *Sealfon* v. *United States*, 332 U.S. 575, 579-580 (1948); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 577 (1974).[26]

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[25] Collateral estoppel does not apply, however, if the issues are different, even slightly. *E.g.*, *Stone* v. *United States*, 167 U.S. 178, 188 (1897); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234-235 & n.5 (1972). Nor is the government bound by an adverse determination made in a criminal case for purposes of subsequent civil litigation, where the standard of proof is less strict. *Id.* at 235; *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938).

[26] Since 1969, aspects of this rule have been held to be constitutionally required in criminal cases. *Benton* v. *Maryland*, 395 U.S. 784, 793-795 (1969), held that the Double Jeopardy

Traditionally, collateral estoppel existed only when the potential for estoppel from the first judgment was mutual. See *Bigelow* v. *Old Dominion Copper Co.*, *supra*. Recently, however, this Court has extended the doctrine of collateral estoppel, with certain qualifications, to bar relitigation of an issue fully and fairly resolved against a party in a prior civil suit when the issue arises in a subsequent civil suit against wholly different parties. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320-327 (1971) (defensive use); *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322 (1979) (offensive use). The Court has never suggested, however, that this principle of nonmutual collateral estoppel should be extended to criminal prosecutions.

The court of appeals considered at length the competing considerations concerning whether nonmutual collateral estoppel ought to be extended to criminal cases and concluded that it should not (Pet. App. 26a-39a). We agree fully with the court's analysis of these considerations and add only the following.

1. Application of nonmutual collateral estoppel to criminal cases would directly affect interests fundamentally different from the interests at stake in civil

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Clause prohibits reprosecution of the same defendant for the same offense after an acquittal. *Ashe* v. *Swenson*, 397 U.S. 436 (1970), held that a defendant acquitted of an offense could not be prosecuted for a different offense requiring relitigation of a factual issue determined in his favor in the first trial. See also *Simpson* v. *Florida*, 403 U.S. 384 (1971); *Harris* v. *Washington*, 404 U.S. 55, 56 (1971) (second prosecution based on new evidence barred by *Ashe*).

cases. In civil cases, the court serves essentially as an arbiter to resolve private disputes. The principal consideration justifying the application of nonmutual collateral estoppel in civil cases is the achievement of judicial economy in the resolution of such disputes. No intolerable injury is suffered by permitting only one full and fair opportunity to litigate factual issues in the settlement of such disputes.

Where criminal cases are concerned, however, there is an additional and overriding consideration: the effective and complete enforcement of federal criminal statutes. In fashioning judge-made rules of procedure and evidence in the federal courts, the Court has consistently struck the balance of competing considerations in favor of the "important federal interest[] * * * in the enforcement of federal criminal statutes * * *." *United States* v. *Gillock*, No. 78-1455 (Mar. 19, 1980), slip op. 12 (and cases cited therein). This federal interest was completely absent from the calculus in *Blonder-Tongue* and *Parklane*.[27] It would be

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[27] Nonmutual collateral estoppel has been applied on the civil side only where the public interest in law enforcement is not adversely affected. Although there is a public interest in the enforcement of the antitrust, securities and other laws through private civil suits, in which the public interest is collectively represented by "private attorneys general," a judgment against one such private plaintiff does not bar any other unrelated party from bringing his own suit against any wrongdoer involved in the same transaction. Even on the civil side, therefore, nonmutual collateral estoppel has only been applied where the public interest in enforcement of the law is not adversely affected. Thus, in *Parklane* the public interest in enforcement of the securities laws was actually

frustrated in at least two ways by the extension of nonmutual collateral estoppel to criminal cases.

First, as the court of appeals observed (Pet. App. 30a), extension of nonmutual collateral estoppel to the federal criminal law would frustrate the federal interest in enforcing the law to the fullest against each violator. Effective and complete enforcement depends on being able to hold accountable each participant in a crime regardless of the strength of evidence available to convict any other participant or the willingness of a jury to convict any other participant. "Spread[ing] * * * an erroneous acquittal to all those who participated in a particular transaction" would thus severely undermine the public interest in federal law enforcement (*ibid.*).[28]

Second, the introduction of nonmutual collateral estoppel into the criminal law would unduly complicate investigatory and prosecutorial decisions. At present, for example, a prosecutor is free in a case of

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strengthened by the use of offensive nonmutual collateral estoppel, and in *Blonder-Tongue* the only predominant interest affected by the defensive use of nonmutual collateral estoppel was the private interest in the monopoly created by the patent.

[28] This factor would also skew the considerations of the government in deciding whether to oppose severances. Severances ought to be requested and granted only to avoid prejudice from a joint trial. See Fed. R. Crim. P. 14. Nonmutual collateral estoppel would introduce a consequence of severance into the decision whether to oppose a severance that has nothing to do with the question of prejudicial joinder. The government would thus have an incentive to oppose severances that might otherwise be unopposed, at least in cases where the degree of prejudice from joinder is ill-defined.

organized criminal activity to prosecute the "underlings" promptly on the basis of the available evidence without fear that an acquittal will prejudice his ability to seek convictions of the "higher-ups" in the event further investigation and new evidence links them to the crime. Nonmutual collateral estoppel, however, would force prosecutors to choose between (i) prosecuting the "underling" promptly with the available evidence—at the risk of an acquittal and bar to pursuing the "higher-ups," and (ii) postponing all prosecutions while pursuing stronger evidence against the underling and other potential participants —at the risk of impeding the public interest in swift justice, injuring the individual interest in speedy trials, and risking the loss of the evidence at hand through staleness or eventual unavailability of witnesses. No such comparable public interest is affected in the civil cases where nonmutual collateral estoppel has been applied.

2. The doctrine of nonmutual collateral estoppel rests entirely on the premise that the litigant who is being held bound by a prior determination has had a full and fair opportunity to litigate the issue on which he is to be estopped. Judge Gibbons' dissent in this case recognizes (Pet. App. 65a-66a) that the prior acquittal of one alleged participant to a criminal transaction would not automatically bar trial of another participant. Each such case would require an inquiry into the circumstances of the first trial to determine whether the government was for any reason foreclosed from presenting all its evidence to

the jury, with the government able to defeat estoppel upon showing some material foreclosure.[29] Judge Gibbons concluded that such an inquiry would be as feasible in criminal as in civil cases.

But this conclusion overlooks certain fundamental structural differences between civil and criminal cases that indicate that the prosecution rarely if ever has the kind of "full and fair opportunity" to prove its case that underlies the doctrine of nonmutual collateral estoppel. To begin with, there is extremely limited pretrial discovery in criminal cases, not only under the rules but because the defendant, as well as other suspected participants in the crime, enjoy a constitutional privilege to withhold inculpatory evi-

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[29] There are numerous ways, many of them unique to criminal cases, in which the prosecution at the first trial may have been unable to present all its evidence bearing upon the factual findings as to which it could later be estopped. For instance, evidence may be excluded under the Fourth Amendment in one case, when it would be admissible subsequently against another defendant whose privacy rights were not violated. The privilege against self-incrimination may protect a witness from testifying at one trial but be waived at another. The Confrontation Clause may mandate exclusion of statements against one defendant but not against another. The speedy trial requirement may force the government to proceed against one defendant before all of the evidence is marshalled. The marital privilege may prevent testimony from being offered against one defendant which is admissible against a second defendant. Because of these and other protections accorded a criminal defendant, the government does not receive the same "full and fair opportunity to litigate" that is provided parties in civil cases. At least when the government's proof at the first trial is inhibited for any of these kinds of reasons, we assume nobody would seriously suggest that nonmutual collateral estoppel is proper.

dence. Thus, unlike a civil plaintiff, the prosecution's opportunity fully to develop its case at the first trial is perforce limited. Second, unlike civil cases, the prosecution may not move for a directed verdict in its favor or obtain a judgment notwithstanding a verdict of acquittal, even though the evidence of guilt may be overwhelming. Nor may the government move for a new trial on the ground that an acquittal was against the weight of the evidence. Finally, the prosecution may not, because of the Double Jeopardy Clause, secure appellate review of an acquittal.

In civil cases, all of these procedures constitute safeguards that insure a full and fair opportunity to litigate and that protect against erroneous factual or legal determinations. Indeed, one of the reasons that a judgment must be vacated if a case becomes moot while on appeal is to avoid any collateral estoppel effect from a determination that has not been scrutinized and sustained on review. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). In criminal cases, however, the government has no recourse against an erroneous acquittal, and, consequently, such an acquittal cannot be said to result from a full and fair opportunity to litigate the issue of guilt.

Moreover, apart from its unreviewability, there is another important reason why a jury's acquittal of one defendant should not estop the government from prosecuting a different defendant. It is well recognized that acquittals in criminal cases may result not only from a reasoned assessment of the evidence but on account of compassion, compromise, or nullifi-

cation. The present case illustrates this point quite well. The evidence convincingly demonstrates Niederberger's guilt. Nonetheless, Niederberger's jury, with respect to the Miami Beach and Absecon vacations, found him not guilty on the Section 7214(a)(2) counts but guilty on the Section 201(g) counts (Pet. App. 3a). Given the parallel nature of the counts in the context of Niederberger's case, it seems evident that his jury, because of compassion or compromise, found him guilty but rendered essentially inconsistent verdicts on the parallel charges. Nonetheless, the government had no avenue to challenge the jury's acquittals—even though they appeared to be erroneous.

3. The main rationale for nonmutual collateral estoppel is judicial economy. It is doubtful whether extension of the doctrine to criminal cases would meaningfully serve that objective. While defendants would no doubt frequently raise collateral estoppel whenever any other participation to the criminal transaction with which they are charged has been acquitted, the number of instances in which such claims are likely to prevail would probably be few—if for no other reason than that the government, with its limited resources, is unlikely to ignore the effect of a previous acquittal of one defendant when that acquittal resulted from a full opportunity to litigate and the government can present no stronger case against other defendants.

Moreover, any savings that might be effected by the elimination of a few trials (and in the instant case collateral estoppel would have accomplished no ma-

terial saving, since petitioner would still have had to stand trial on the Section 201 counts) must be weighed against the substantial costs entailed in the effort to pass upon motions to dismiss on collateral estoppel grounds. See *Sea-Land Services, Inc.* v. *Gaudet, supra*, 414 U.S. at 608-610 (Powell, J. dissenting). This inquiry would be many times more difficult than it is in civil cases, where all that must be determined is what the first fact-finder found. Those findings will ordinarily be presumptively valid. In criminal cases, the inquiry into the prosecution's full and fair opportunity to litigate at the first trial will necessitate exhaustive review of all evidentiary rulings excluding evidence proffered by the prosecution or admitting defense evidence over objections, as well as careful review of the charge to the jury—none of which will have been subject to review on appeal in the first proceeding. In short, adoption of nonmutual collateral estoppel in criminal cases is more likely to increase than to alleviate the demands upon the resources of the federal judiciary.

4. Finally, contrary to petitioner's argument (Br. 21-45), the extension of nonmutual collateral estoppel to criminal cases would not substantially enhance the perception of fairness. This argument is based on the premise that it is unfair to convict one defendant but not another when their liability turns solely on a common factual determination. This inconsistency is no more unfair, however, than the inconsistency that has long been tolerated in joint trials. For example, in *United States* v. *Dotterweich*, 320 U.S. 277, 279

(1943), an individual officer acting on behalf of a corporation was convicted, but the corporation was not. The Court rejected the officer's contention that the inconsistent verdict was impermissible (*ibid.*):

> Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.

The fact is that "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Miller* v. *California*, 413 U.S. 15, 26 n.9 (1973); *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393 (1932).

Moreover, any lack of evenhandedness that may appear to arise from such inconsistent verdicts is offset by the disparities that would result under a regime of nonmutual collateral estoppel in cases where co-participants in a crime are tried seriatim. In such circumstance, a defendant's probability of being convicted would depend in large part on how many other co-participants were tried before him. The first defendant would face the greatest risk of conviction. Each defendant tried thereafter would have not only the chance that his own jury would acquit him but the additional possibility that prior juries would have acquitted a co-participant on a common factual issue.

Obviously, the participant to go last would have the least risk of conviction.

This inequity could be avoided only by spreading the effect of any acquittal based on a common issue—even a subsequent acquittal—to discharge all participants—even those convicted before the trial in or during which the acquittal occurs. Such a solution, however, would require the government not only to convince one jury of the guilt of a participant in his own trial beyond a reasonable doubt in order to convict him but to prove his guilt beyond a reasonable doubt to two, three or as many separate juries as there were separately tried participants. This solution would impose an intolerable burden of proof on the prosecution in such cases.

5. Petitioner's suggestion that nonmutual collateral estoppel has already been applied in conspiracy cases is without merit. Although a number of lower federal courts have held, as petitioner observes (Br. 36-37), that an acquittal of all but one alleged co-conspirator in the same or different trials automatically requires the reversal of his conviction too, because "one cannot conspire with himself" (see Br. 20), this Court has never so held. The decisions cited by petitioner merely hold that a conspiracy conviction cannot stand where there is no proof or no legally sufficient proof that anyone with whom the accused allegedly conspired in fact entered into the agreement. *Morrison* v. *California*, 291 U.S. 82, 92 (1934); *Hartzel* v. *United States*, 322 U.S. 680, 682 n.3 (1944); *Bates* v. *United States*, 323 U.S. 15

(1944); see also *Gebardi* v. *United States*, 287 U.S. 112, 120-122 (1932); *Hyde* v. *United States*, 225 U.S. 347, 377 (1912). None of those decisions holds that where there is ample proof to support every element of a conspiracy, a jury may not convict only one of the alleged conspirators.[30] Although such a

[30] *Gebardi* held that the Mann Act had adopted an affirmative legislative policy not to punish the mere acquiescence of the woman in the unlawful transportation, a policy which precluded her conviction for conspiracy with a man to violate the Mann Act. Thus, as a matter of law, there was insufficient proof that the woman had made an illegal agreement. In turn, there was insufficient proof as a matter of law to support the man's conspiracy conviction, because the woman's culpable agreement was an essential element of his conviction. *Morrison* held that the proof of a conspiracy in that case rested on an unconstitutional presumption of guilty knowledge by one conspirator. As a matter of law, the remaining proof was insufficient to establish an agreement to violate the statute by that person. Since his agreement was an essential element of the offense, the proof was insufficient as a matter of law as to both alleged co-conspirators. In *Hartzel* the trial judge set aside the conspiracy convictions of two of three alleged co-conspirators for insufficient proof as a matter of law as to their involvement in the conspiracy. This, in turn, the Court held, required reversal of the conviction of the third conspirator, because their involvement in the conspiracy was an essential element of the conspiracy and the proof thereof was legally insufficient. 322 U.S. at 682 n.3 (In *Gebardi*, *Morrison* and *Hartzel* the co-conspirators were tried together). *Bates*, arising on a confession of error, held that where an accused, in order to procure gold, falsely advised his anticipated supplied (a federal agent) that he was, in effect, conspiring with Nazi agents to export the gold, the conspiracy conviction could not stand where the conspiracy concededly never existed and rested on no more than the sham representations to the anticipated supplier. Only in *Hyde* did the Court come close to deciding whether "where all but one are acquitted there can be no legal conviction as to him, the acquittal of the others being tantamount to the finding of no conspiracy." 225 U.S. at 377. The issue was not reached, however, because more than one conspirator had been convicted, and the question was in any event resolved in the government's favor by subsequent cases upholding inconsistent verdicts.

verdict would be internally inconsistent, it may only reflect jury compassion, and the Court has long accepted such inconsistencies as one of the features of the jury system. Certainly, there can be no requirement that two different juries in two different trials with only partially overlapping evidence reach the same verdict.

III. THE JURY WAS PROPERLY INSTRUCTED

Petitioner contends (Br. 15, 19-20) that the court erred in refusing to instruct the jury that, in order to convict under 18 U.S.C. 2, it had to find that petitioner and Niederberger had agreed that Niederberger receive a gratuity in exchange for his conduct in the Gulf audits. The existence of an agreement, however, is not necessary to support a conviction under 18 U.S.C. 2. *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949); *United States* v. *Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978); *United States* v. *Peterson*, 524 F.2d 167, 174 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); *United States* v. *Lane*, 514 F.2d 22 (9th Cir. 1975).[31]

[31] Petitioner's analogy to the law of conspiracy (Br. 36-37) is inapposite. With conspiracy, the combination or agreement itself is the crime. The statute outlawing conspiracies, 18 U.S.C. 371, was designed to protect society from the enhanced

Petitioner also challenges (Br. 17-18) the court's instruction that the accuracy of Gulf's returns and reports (including the Bahamas Ex Report) was irrelevant so long as the vacations were given "to create a better working atmosphere" or "for a speedy and favorable audit" (A. 48a-50a). This instruction was correct because both Sections 201(f) and 7214(a)(2) are designed to prevent officials from being tempted by unauthorized compensation—even if in particular circumstances the temptation is resisted. *United States* v. *Barash*, 412 F.2d 26, 29-30 (2d Cir.), cert. denied, 396 U.S. 832 (1969); *United States* v. *Irwin*, 354 F.2d 192, 197-198 (2d Cir. 1965); *United States* v. *Cohen*, 387 F.2d 803 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968); *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978).[32]

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danger involved in concerted criminal activity. See *United States* v. *Feola*, 420 U.S. 671, 693 (1975). The statute under which petitioner was convicted, 18 U.S.C. 2, simply defines the status of an aider and abettor as that of a principal. It does not require the existence of concerted actions or any agreement. See *United States* v. *Krol*, 374 F.2d 776 (7th Cir.), cert. denied, 389 U.S. 835 (1967).

[32] Petitioner suggests (Br. 18-19) that the trial court erroneously excluded evidence that no criminal action was taken by the Justice Department as a result of its investigation into the Bahamas Ex Report. This contention is without merit. The government established at trial that Niederberger's report on the Bahamas Exploration Corporation was submitted in 1973. Niederberger received free vacations at Gulf expense before and after (see pages 5-6, *supra*). During this period of time, as petitioner concedes (Br. 19), the Bahamas Corporation was under active criminal investigation. The fact that the Department of Justice decided in April 1975, some nine months after the last vacation given Niederberger, not to prosecute Gulf was irrelevant to any question of petitioner's previous motivation in accepting the vacations. The court therefore properly ruled such evidence inadmissible (Tr. 650-656). Moreover, like the correctness of returns filed by Gulf, the accuracy of Niederberger's report is irrelevant to violations of 18 U.S.C. 201(f). (Nonetheless, the court allowed petitioner to establish that Gulf incurred no additional tax liability as a result of further investigation into the Bahamas Corporation (Tr. 411).)

CONCLUSION

The judgment of the court of appeals should be affirmed.

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MARCH 1980

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